



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Lori Mitchell

**SUBJECT:** SEE BELOW

**DATE:** December 14, 2020

Approved

Date

12/17/20

**SUBJECT: AUTHORIZATION TO JOIN CALIFORNIA COMMUNITY POWER, A  
NEW JOINT POWERS AUTHORITY**

## RECOMMENDATION

Adopt a resolution:

- (a) Authorizing the City Manager or his/her designee to join San José Clean Energy to the new Joint Powers Authority (California Community Power or CC Power) and execute the California Community Power Agency Joint Powers Agreement provided as Attachment 1; and
- (b) Authorizing the City of San José to pay a share of CC Power's annual costs in an amount not to exceed the contract authority of the City Manager for the corresponding Fiscal Year, subject to the appropriation of funds.

## OUTCOME

By executing the California Community Power Agency Joint Powers Agreement (CC Power Agreement), San José Clean Energy (SJCE) would become a member of a new Joint Powers Authority (JPA) that will include several Community Choice Aggregators<sup>1</sup>. Joining CC Power would make SJCE responsible for its share of CC Power's modest general and administrative costs, estimated to be \$80,000-\$230,000 annually, with SJCE's share estimated to be \$10,000-\$30,000. The JPA would be governed by a board of directors. Each member of the JPA would have one seat on the board and one vote in the board decisions.

<sup>1</sup> The list of CCAs currently expected to participate in CC Power includes: Central Coast Community Energy, Clean Power SF, MC Energy, Peninsula Clean Energy, Redwood Coast Energy Authority, San José Clean Energy, Silicon Valley Clean Energy, Sonoma Clean Power. Additional CCAs and non-CCA public entities may join, subject to approval by the board in accordance with Section 3.01 of the CC Power Agreement.

CC Power may develop, acquire, construct, own, manage, contract for, engage in, finance and/or provide projects and energy related programs and services for the use of and by those of its members that contract to participate in and pay for any such projects, programs or services.<sup>2</sup> Joining CC Power would give SJCE the option to participate in projects sponsored by CC Power that may not be otherwise possible. CC Power allows for economies of scale needed to support larger projects that help ensure grid reliability such as long duration storage projects. Joining the JPA could also assist with Resource Adequacy (RA) compliance obligations as sellers prefer one large agreement instead of numerous smaller ones. Finally, the formation of a JPA, allows for joint CCA procurement that could help avoid regulator mandated central procurement by Investor Owned Utilities (IOU's) that would threaten SJCE's procurement autonomy.

Membership in the JPA does not mandate participation in any CC Power program, project, or service. SJCE would only benefit from and be responsible for the costs of programs, projects or services in which SJCE decides to participate through a project agreement. SJCE will seek further City Council approval to participate in any project agreement.

CC Power would allow CCAs to contract more effectively for long duration storage projects that the California Public Utilities Commission (CPUC) and the California Independent System Operator (CAISO) have identified as critical to maintain reliability. CCAs face a significant risk that the CPUC or the legislature will direct or allow Investor Owned Utilities (IOUs) to contract for projects on the CCAs' behalf resulting in higher non-bypassable charges such as the PCIA and undermining CCA procurement autonomy.

## **BACKGROUND**

Section 26.50.020 of the Municipal Code states that the City may enter contracts to procure power products for a term up to twenty-five (25) years. Section 26.50.050 of the Municipal Code requires the Director of Community Energy ("Director") to submit a Risk Management Policy to City Council. On May 1, 2018, the City Council approved the Energy Risk Management Policy and associated Energy Risk Management Regulations.

The Energy Risk Management Policy created a Risk Oversight Committee (ROC) responsible for overseeing compliance with the policy requirement. The Energy Risk Management Policy and associated Energy Risk Management Regulations set forth a risk control structure and procurement requirements that apply to SJCE procurement activities. The ROC has been in operation since mid-2018.

City Council has authorized SJCE to procure power to meet our obligations. Most recently, on August 25, 2020, City Council authorized the Director of Community Energy or her designee to procure long-term renewable energy for a total not to exceed amount of \$1,500,000,000 in aggregate in Calendar Years 2024 through 2043; and short- and medium-term power supply products, other than Resource Adequacy products for a not to exceed amount of \$275,000,000 in

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<sup>2</sup> A full list of CC Power's powers is listed in Section 2.03 of attachment 1.

aggregate in Calendar Years 2024 through 2032. On April 7, 2020, City Council authorized the Director of Community Energy to procure Resource Adequacy products for a not to exceed amount of \$538,000,000 in aggregate in calendar years 2021 through 2043.

On August 25, 2020, City Council approved an Integrated Resource Plan (IRP) for SJCE. The preferred portfolio in the plan indicated that SJCE should, by 2030, add:

- 100 MW of wind,
- 320 MW of solar,
- 200 MW of battery storage.

The CPUC required CCAs and other Load Serving Entities to evaluate and discuss long-duration storage in their IRPs. While SJCE's IRP modeling did not identify long-duration storage as a cost-effective addition prior to 2030, SJCE discussed in its IRP the importance of continuing to explore market opportunities to add competitive long-duration storage. Reliability issues during summer of 2020 highlighted the importance of ensuring sufficient supply during all hours of the day.

On December 10, 2020, the ROC approved SJCE's recommendation to join CC Power, subject to approval by City Council.

## **ANALYSIS**

### ***California Community Power Joint Power Authority***

Silicon Valley Clean Energy, Central Coast Community Energy (formerly Monterey Bay Community Energy), and Peninsula Clean Energy are leading an effort to form a JPA made up of a group of CCAs called CC Power. CC Power addresses concerns expressed by regulatory agencies and industry stakeholders that the CCA model breaks up the industry into entities too small to contract for large infrastructure projects. Developers of large energy projects often prefer a larger single transaction with one entity rather than several smaller transactions.

CC Power will be used to develop, acquire, construct, own, manage, contract for, engage in, finance and/or provide projects and energy related programs and services for the use of and by its members. It is not intended to supersede or duplicate the regulatory and legislative advocacy undertaken by California Community Choice Association (CalCCA). CC Power is intended to be a procurement entity rather than a trade association. CC Power may from time-to-time, advance or support public policies in support of its purpose that do not conflict with interests or policies advanced by any member.

Early CC Power efforts would focus on contracting for larger resources than would typically be available to a single or smaller collection of CCAs. In the future, CC Power could evolve to offer additional services and opportunities beyond energy procurement such as wholesale energy services, scheduling coordination, and billing.

The CC Power approach is modeled on the successful formation and operation of similar entities by municipal utilities such as:

- *Northern California Power Agency:* [www.ncpa.com](http://www.ncpa.com)
- *Southern California Public Power Authority:* [www.scppa.org](http://www.scppa.org)
- *Transmission Agency of Northern California:* [www.tanc.us](http://www.tanc.us)

Each member of CC Power would hold one seat on the board and have one vote for board decisions. In addition, each member would be responsible for an equal share of the annual ongoing costs of the organization estimated to be \$80,000-\$230,000 a year in total. SJCE's annual share is estimated to be \$10,000-\$30,000.

The purpose of CC Power is to enable joint procurement among the Members, the JPA is intended to have limited staff. Initially, CC Power is expected to have no more than one to two part-time to full-time staff, depending on the level of activity. Costs would be shared equally among the original members and any additional members would also pay an equal share of the costs, potentially reducing SJCE's cost obligations under the agreement.

The CC Power Agreement requires that the annual budget must be approved by a quorum of the CC Power Board at an official Board meeting, and there would be public noticing of such meetings in accordance with the Brown Act. As soon as the CC Power Agreement is signed, work will begin to develop key organizational documents such as by-laws setting forth in more detail CC Power's plans for staffing and budgeting requirements. Upon joining CC Power, SJCE will pursue the adoption by CC Power of by-laws with a budget process that aligns with those of SJCE and the City of San José, and provides the opportunity to timely evaluate continued participation by SJCE if the budget costs outweigh the benefits of participation.

In addition, staff will ensure there is a cost cap for SJCE's share of the annual budget equal to the contract authority of the City Manager, above which SJCE would require approval from the ROC and City Council. Importantly, SJCE will not incur any costs associated with any Project Agreements unless the ROC and City Council approve participation in those projects and associated contracts.

Once CC Power is formed, all CC Power members, including SJCE, will decide whether or not to participate in any specific projects, programs or services through the execution of a Project Agreement. ***There is no obligation in the CC Power Agreement that a member join a Project Agreement for any specific project, program or service.*** SJCE would have a case by case option to join or decline specific procurement efforts as they arise and would pay its share of the cost, and reap the benefits, accordingly. Future ROC and City Council approval is required to participate in any of the projects, programs and/or services of CC Power.

SJCE would continue its standard procurement activities; CC Power efforts would not replace existing staff or procurement practices. However, if CC Power pursues a promising project, SJCE could, with appropriate approval from the ROC and City Council, opt to obtain needed

products and service through CC Power rather than individually. A graphical representation of CC Power's structure can be found in Attachment 2.

The following CCAs have expressed their intention to join CC Power pending governing board approvals:

- Central Coast Community Energy
- Clean Power SF
- MCE Clean Energy
- Peninsula Clean Energy
- Redwood Coast Energy Authority
- Silicon Valley Clean Energy
- Sonoma Clean Power

MCE Clean Energy's Board has formally approved joining CC Power. Additional CCAs not listed here could decide to join later. In addition, the CCAs listed here could decide not to join following consideration by their respective governing boards.

The CC Power Agreement includes key terms for governance summarized here:

#### Governance and Operation

- CC Power will be administered by a Board consisting of the member agencies' Chief Executive Officers (CEOs), Directors, Executive Directors, or General Managers, or their designees.
- Each member will have one Director as a representative on the Board and each Director will have one vote.
- CC Power will be managed by a General Manager for the day-to-day operations and management. Initially this will be accomplished through part time consultants.
- Duties such as Treasurer may be executed by Members' staff.

#### Costs

- General and administrative costs will be allocated on an equal share basis of one share for each participating member CCA.
- The annual cost for SJCE is expected to be \$10,000-\$30,000.
- General and administrative costs do not include any costs that relate to any project or project agreement.
- Particular projects, programs, or service costs will be determined in an individual project agreement. Project agreements must be executed by project participants and will detail the costs related to the relevant project, program or service. Members decide whether or not to enter into any particular project agreement.

Projects

- Energy projects may include, but are not limited to, any of the following:
  - the construction, financing or acquisition of a wholesale power resource, resource adequacy and/or renewable and environmental attributes for use by the members, and such other transactions, services, and goods that may be necessary or convenient to construct, finance, acquire or optimize the value of such resources;
  - the bulk purchasing and/or financing of decarbonization products, including, but not limited to, heat pump water heaters, space heater heat pumps and electric vehicle charging services;
  - energy risk management and CAISO scheduling products and services;
  - acquisition, construction and financing of facilities for the generation or transmission of electrical energy and any related transactions, services, and goods that may be necessary or convenient to acquire, construct, and finance these facilities;
  - grid integration services; and
  - acquisition of capacity rights in any facility for the generation or transmission of electric energy.
- CC Power will contract directly with project developers, and program and service providers.
- Participating CC Power members will enter into a Project Agreement that will define the rights and obligations of each member CCA and the member's respective rights and obligations with respect to the project, program or service.

Withdrawal

- Members have the option to withdraw from CC Power at any time, provided that the member has satisfied its agreed upon share of costs and obligations.
- If a member withdraws, the share of general and administrative cost for the remaining members of CC Power will increase proportionally, thereby requiring a budget revision.
- Withdrawing members will remain subject to obligations they have incurred in any executed Project Agreements, in accordance with the terms of those agreements.

Liability

- The debts and obligations of CC Power do not constitute the debts and obligations of the members.
- Members do not have any obligation to enter into any particular Project Agreement and do not have liability for projects they do not join.
- Any risks associated with joint procurement would be addressed in individual Project Agreements.
- For SJCE and San Francisco's CleanPower SF, the CC Power Agreement includes provisions that will limit the liabilities of these two entities to their special enterprise funds.

***Initial CC Power Project: Pursuing Long Duration Storage***

The CPUC, the California Energy Commission (CEC), the CAISO, Load Serving Entities (LSEs), developers, and non-governmental organizations all have identified that long duration storage could be needed to fully decarbonize the electrical grid. Long duration storage may be needed to store excess solar energy during the day for later discharge at night. Currently, most energy storage is lithium-ion battery cells similar to those found in electric vehicles. The banks of batteries are typically built to continuously discharge for four hours so that they may qualify as RA under the CPUC RA program.

The RA program requirements have led to a large queue of four-hour battery storage projects in connection with solar projects as well as standalone systems that charge from the grid. However, four-hour batteries only shift the excess energy of the day to the evening. Additional resources are required to cover the load that remains overnight. While some baseload renewable generation from biomass, geothermal, and wind exists; additional resources are needed.

SJCE will complete a thorough analysis of the associated risks and benefits and present them to ROC and City Council as part of any request for approval to join a proposed project.

***Political, legislative, and regulatory considerations***

The California Legislature has considered bills in the last two sessions to mandate long-duration storage development by a third party or the IOUs on behalf of all LSEs including CCAs. This approach would increase non-bypassable costs, such as the Power Charge Indifference Adjustment and would likely increase costs overall. In addition, there is a risk that the CPUC may, without legislative action, direct the IOUs to procure long-duration storage on behalf of CCAs.

CC Power offers an approach for CCAs to effectively undertake their own procurement of larger projects and could forestall legislative or regulatory directives assigning such procurement to the IOUs or some other third party. CC Power demonstrates CCA capacity and interest in undertaking projects needed to support deep decarbonization and maintain reliability.

**CONCLUSION**

Staff recommend City Council adopt a resolution authorizing the City Manager or his/her designee to execute the CC Power Agreement and thereby join CC Power to maximize procurement opportunities and take advantage of potential economies of scale.

**EVALUATION AND FOLLOW-UP**

If authorized, the City Manager or his/her designee will execute the CC Power Agreement and join CC Power. Staff will undertake a thorough analysis of any projects pursued by CC Power

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and obtain ROC and Council approval prior to joining any project. Depending on the results of the long duration storage RFO, staff may return to Council to seek approval to participate in one or more CC Power long duration storage projects identified through the RFO process.

### **CLIMATE SMART SAN JOSE**

The recommendation in this memo aligns with one or more Climate Smart San José energy, water, or mobility goals.

### **PUBLIC OUTREACH**

This memorandum will be posted on the City's website for the January 5, 2021 City Council meeting.

### **COORDINATION**

This memorandum has been coordinated with the City Attorney's Office and the City Manager's Budget Office.

### **COMMISSION RECOMMENDATION/INPUT**

The CC Power Agreement was not considered by the Clean Energy Community Advisory Commission.

### **FISCAL/POLICY ALIGNMENT**

The recommended actions support Climate Smart San José (action 1.1 Transition to a Renewable Energy Future) and the Envision San José 2040 General Plan (Goal MS-2 and Appendix 8: GHG Reduction Strategy).

### **COST SUMMARY/IMPLICATIONS**

Membership in CC Power is expected to result in an additional 2020-2021 estimated cost of between \$10,000-\$30,000, which represents SJCE's proportionate share of CC Power's estimated general administrative costs. For 2020-2021, the cost of membership will be provided from funds already appropriated within the Community Energy Department's Non-Personal/Equipment appropriation in the San José Clean Energy Operating Fund. Funding for



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future membership costs will be subject to the appropriation of funds as part of the annual budget process.

**CEQA**

Not a Project, File No. PP17-003, Agreements/Contracts (New or Amended) resulting in no physical changes to the environment.

/s/  
LORI MITCHELL  
Director, Community Energy

For questions, please contact Lori Mitchell, Director of Community Energy Department, at (408) 535-4880.

Attachment 1 – California Community Power Agency Joint Powers Agreement

Attachment 2 – California Community Power Structure Graphic

## **CALIFORNIA COMMUNITY POWER AGENCY JOINT POWERS AGREEMENT**

This Joint Powers Agreement ("Agreement") is made by and among those public agencies who are signatories to this Agreement, and those public agencies which may hereafter become signatories to this Agreement, for the purpose of operating a separate joint powers agency, which is named "California Community Power" or "CC Power."

### **WITNESSETH**

WHEREAS, it is to the mutual benefit of the Members and in the public interest that the Members join together to engage in the exercise of powers they have in common including, but not limited to, (i) the acquisition and operation of wholesale power supplies, resource adequacy and renewable attributes, (ii) the provision of joint consulting and contracting services via master agreements and bulk purchasing and financing of decarbonization products, (iii) the offering of energy risk management and California Independent System Operator ("CAISO") scheduling services; and (iv) other energy services or programs which may be of benefit to Members (collectively, hereinafter "energy related programs");

WHEREAS, CC Power's primary objective is to provide for joint procurement of electrical power and storage and other energy projects for its Members, as set forth in this Agreement;

WHEREAS, the Members intend that CC Power shall better position the Members to administer community choice energy programs, and achieve their local agency goals, including but not limited to meeting or exceeding California's greenhouse gas emission reduction targets through procurement of renewable resources.

WHEREAS, each of the public community choice aggregation agencies which is a Member to this Agreement has the power to establish, manage, operate and maintain Community Choice Aggregation ("CCA") programs, electric service enterprises available to cities and counties pursuant to California Public Utilities Code Section 331.1(c) and 366.2 and to study, promote, develop, conduct, operate and manage energy related programs; and

WHEREAS, Title I, Division 7, Chapter 5, Article 1 of the California Government Code (the "Joint Powers Act" or "Act") authorizes the joint exercise by two or more public agencies of any power which is common to each of them.

NOW, THEREFORE, the Members, for and in consideration of the mutual promises and agreements herein contained, do hereby agree as follows:

### **Article I. DEFINITIONS**

In addition to the other terms defined herein, the following terms, whether in the singular or in the plural, when used herein and initially capitalized, shall have the meanings specified throughout this Agreement.

**Section 1.01** "Board" means the Board of Directors of CC Power as established by this Agreement.

**Section 1.02** "CC Power" means the Joint Powers Authority established by this Agreement.

**Section 1.03** "Member" means a Public CCA Agency, or other public agency the Board determines to be eligible pursuant to Section 3.02, that is a signatory to this Agreement and has met the requirements of

Article III; the term “Member” shall, however, exclude any Public CCA Agency or other eligible public agency which shall have withdrawn or been excluded from CC Power pursuant to Section 3.04 below.

**Section 1.04 “Project”** means any and all of the following matters, which are approved by the Board pursuant to Article VI: (i) the construction, financing or acquisition of a wholesale power resource, resource adequacy and/or renewable and environmental attributes for use by the Members, and such other transactions, services, and goods that may be necessary or convenient to construct, finance, acquire or optimize the value of such resources, (ii) the bulk purchasing and/or financing of decarbonization products, including, but not limited to, heat pump water heaters, space heater heat pumps and electric vehicle charging services, (iii) energy risk management and CAISO scheduling products and services, (iv) acquisition, construction and financing of facilities for the generation or transmission of electrical energy and any related transactions, services, and goods that may be necessary or convenient to acquire, construct, and finance these facilities, (v) grid integration services, (vi) acquisition of capacity rights in any facility for the generation or transmission of electric energy, and (vii) any other energy related programs.

**Section 1.05 “Project Agreement”** means a contract between and among CC Power and Project Participants.

**Section 1.06 “Project Participants”** means any Member or group of Members who participate in a Project pursuant to Article VI below.

**Section 1.07 “Public CCA Agency”** means any public agency, or such joint powers agencies/authorities consisting of one or more public agencies, that has implemented a CCA program pursuant to California Public Utilities Code Sections 331.1 and 366.2.

## **Article II. FORMATION OF AUTHORITY**

**Section 2.01 Creation of CC Power.** Pursuant to the Joint Powers Act, there is hereby created a public entity, to be known as “CC Power,” which shall be a public entity separate and apart from its Members.

**Section 2.02 Purpose.** The purpose of this Agreement is for CC Power to develop, acquire, construct, own, manage, contract for, engage in, finance and/or provide energy related programs for the use of and by its Members. CC Power is not intended to be a policy-maker or advocate, though it may, from time to time, advance or support public policies in support of its purpose that do not conflict with interests or policies advanced by any Member.

**Section 2.03 Powers.** CC Power is authorized, in its own name, to do all acts necessary to fulfill the purposes of this Agreement as referred to in Section 2.02 above, and engage in the exercise of powers the Members have in common including, but not limited to, each of the following:

- (a) Acquire, purchase, finance, offer, arrange, construct, maintain, utilize and/or operate one or more Projects;
- (b) Establish, operate, maintain and/or fund energy related programs;
- (c) Make and enter into contracts;
- (d) Employ agents and employees;
- (e) Acquire, contract, manage, maintain, sell or otherwise dispose of real and personal property and operate any buildings, infrastructure, works, or improvements;
- (f) Receive contributions and donations of property, funds, services and other forms of assistance from any source;
- (g) Lease real or personal property as lessee and as lessor;
- (h) Sue and be sued in its own name;

- (i) Incur debts, liabilities, and obligations, including but not limited to loans from private lending sources pursuant to its temporary borrowing powers such as Government Code Sections 53850 et seq. and authority under the Act;
- (j) Receive, collect, invest and disburse moneys;
- (k) Issue revenue bonds and other forms of indebtedness, as provided by law;
- (l) Apply for, accept, and receive all licenses, permits, grants, loans or other aids from any federal, state, or local public agency;
- (m) Make and enter into service agreements relating to the provision of services necessary to plan, implement, operate and administer energy related programs;
- (n) Adopt from time to time such policies, procedures, bylaws, rules or regulations for the conduct of its affairs as deemed necessary by the Board;
- (o) Exercise all other powers necessary and proper to carry out this Agreement; and
- (p) Defend, hold harmless, and indemnify, to the fullest extent permitted by law, each Member from any liability, claims, suits, or other actions.

Such powers shall be exercised in the manner provided in Section 6509 of the Government Code of the State of California, as amended, subject only to such restrictions upon the manner of exercising such powers as are imposed upon Silicon Valley Clean Energy in the exercise of similar powers. Should Silicon Valley Clean Energy withdraw or be excluded from this Agreement pursuant to Section 3.04 hereof, the manner of exercising any power shall be subject only to the restrictions upon the manner of exercising such powers as are imposed upon Marin Clean Energy.

**Section 2.04 Compliance with Local Zoning and Building Laws and CEQA.** Unless state or federal law provides otherwise, any facilities, buildings or structures located, constructed, or caused to be constructed by CC Power within the territory of CC Power shall comply with the General Plan, zoning and building laws of the local jurisdiction within which the facilities, buildings or structures are constructed and comply with the California Environmental Quality Act.

### **Article III. MEMBERSHIP**

**Section 3.01 Member Agencies.** Any Public CCA Agency, or other public agency determined by the Board to be eligible pursuant to Section 3.02, may become a Member upon meeting the following conditions:

- (a) The Public CCA Agency or other eligible public agency shall file with the Board a certified copy of a resolution of its governing body whereby it (i) agrees to the provisions of this Agreement, and (ii) requests to become a Member; and
- (b) No such Public CCA Agency or other eligible public agency shall become a Member until (i) its admission is approved at a regular or special meeting of the Board by at least two-thirds (2/3) of the entire Board, and (ii) it deposits or agrees to pay CC Power a share of organization, planning and other costs and charges as determined by the Board to be appropriate, if any.

Upon completion of the foregoing, the Public CCA Agency or other eligible public agency shall become a Member for all purposes of this Agreement.

**Section 3.02 Eligible Public Agency Members.** The Board may adopt policies to determine whether public agencies that are not Public CCA Agencies may be eligible to become a Member of CC Power.

**Section 3.03 Cost Allocations.**

- (a) Unless otherwise determined by a two-thirds (2/3) vote of the entire Board, each Member shall pay an equal share of one member one share for general and administrative costs as determined by the Board associated with all operations of CC Power. General and administrative costs do not include any costs that relate solely to any specific Project Agreement.

- (b) Project Agreements and other program agreements between and among any Member and/or CC Power will determine cost allocation and may consider, among other relevant factors, credit strength of the Members and may differ in price and collateral requirements as determined solely for such Project Agreement or other program agreements.

**Section 3.04 Withdrawal or Exclusion of Member.**

- (a) Any Member may withdraw from CC Power upon the following conditions:
  - (i) The Member shall have filed with the Board Secretary a certified copy of a resolution of its governing body expressing its desire to so withdraw. Once a Member files a resolution to withdraw with the Board Secretary, that Member no longer has any voting rights on the Board;
  - (ii) Members participating in Projects, programs or services pursuant to Project Agreements or other program agreements approved by the Board are subject to the participation and withdrawal terms and conditions described in the applicable agreement; and
  - (iii) Prior to accepting the Member's filing of such resolution, any Member so terminating shall be obligated to pay its share of all debts, liabilities, and obligations of CC Power specifically assumed by the Member. However, this obligation shall take into account any refunds due to the Member and shall not extend to debts, liabilities and obligations secured or otherwise committed pursuant to Project Agreements or other program agreements between and among any Member and/or CC Power. The debts, liabilities and obligations of the Members to such Project Agreements or other program agreements shall be determined by their terms. Any obligations under this Agreement are subject to the limitations set forth in Article VIII.
- (b) Upon compliance with the conditions specified in Section 3.04(a), the Board shall accept the withdrawing Member's resolution and the withdrawing Member shall no longer be considered a Member for any reason or purpose under this Agreement and its rights and obligations under this Agreement shall terminate. The withdrawal of a Member shall not affect any obligations of such Member under any Project Agreement or other program agreement.
- (c) Any Member which has (i) defaulted under this Agreement, a Project Agreement, or other program agreement, (ii) failed to appoint a Director to serve on the Board in accordance with Section 4.02 below, or (iii) failed to pay any required share of costs in accordance with Sections 3.01 and 3.03 above, may have its rights under this Agreement terminated and may be excluded from participation in CC Power by the vote (taken at a regular or special meeting of the Board) of at least two-thirds (2/3) of the entire Board (including the Director representing the defaulting Member). Prior to any vote to terminate participation of any Member, written notice of the proposed termination and the reason(s) for such termination shall be delivered to the Member whose termination is proposed at least 60 days prior to the Board meeting at which such matter shall first be discussed as an agenda item. The written notice of the proposed termination shall specify the particular provisions of this Agreement or a Project Agreement or other program agreement which the Member has allegedly defaulted on, or whether the proposed termination is based on failure to appoint a Director or pay any required share of costs. The Member subject to possible termination shall have the opportunity to cure the violation prior to the meeting at which termination will be considered. At the meeting where termination of the Member is considered, the Member shall be given the opportunity to respond to any reasons and allegations that may be cited as a basis for termination prior to a termination vote. Any excluded Member shall continue to be liable for its obligations under any Project Agreement or other program agreement and for any unpaid contribution, payment, or advance approved by the Board prior to such Member's exclusion.

- (d) The withdrawal or termination of a Member shall not affect the provisions or obligations set forth in Article VIII or Section 11.03 below.

#### **Article IV. POWERS OF BOARD & MANAGEMENT OF CC POWER**

**Section 4.01 Board.** CC Power shall be administered by a Board which shall consist of one Director representing each Member. Such Board shall be the governing body of this CC Power, and, as such, shall be vested with the powers set forth in this Agreement, and shall execute and administer this Agreement in accordance with the purposes and functions provided herein. The Board shall have the authority to provide for the general management and oversight of the affairs, property and business of CC Power.

**Section 4.02 Appointment and Vacancies.** Each Director shall be the Chief Executive Officer, General Manager, or designee of the Chief Executive Officer or General Manager of each Member and shall be appointed by and serve at the pleasure of the Member that the Director represents, and may be removed as Director by such Member at any time. If at any time a vacancy occurs on the Board, a replacement shall be appointed by the Member to fill the position of the previous Director in accordance with the provisions of this Article IV within 60 days of the date that such position becomes vacant or the Member shall be subject to the exclusion procedures in Section 3.04(c) above. Each Director may appoint an alternate to serve in their absence.

**Section 4.03 Notices.** The Board shall comply with the applicable provisions of Sections 6503.5, 6503.6 and 53051 of the Government Code requiring the filing of notices and a statement with the Secretary of State, the State Controller, the applicable county clerk and local agency formation commissions, including, but not limited to:

- (a) Causing a notice of the Agreement or any amendment to the Agreement to be prepared and filed with the office of the Secretary of State within 30 days of the effective date of the Agreement or amendment, and
- (b) Filing a statement of facts with the Secretary of State within 70 days after the date of commencement of CC Power's legal existence. Upon any change in the statement of facts presented to the Secretary of State, an amended statement of facts shall be filed with the Secretary of State within 10 days of the change.

**Section 4.04 Committees.** The Board may create committees to provide advice to the Board or conduct the business of CC Power subject to delegation of authority from the Board.

**Section 4.05 Director Compensation.** Compensation for work performed by Directors, including alternates, on behalf of CC Power shall be borne by the Member that appointed the Director. The Board, however, may adopt by resolution a policy relating to the reimbursement of expenses incurred by Directors.

**Section 4.06 Board Officers.** At its first meeting in each calendar year, the Board shall elect or re-elect a Chair and a Vice-Chair each of whom shall be selected from among the Directors and shall also appoint or re-appoint a Secretary and a Treasurer/Controller each of whom may, but need not, be selected from among the Directors.

- (a) **Chair and Vice-Chair.** The duties of the Chair shall be to preside over the Board meetings, sign all ordinances, resolutions, contracts and correspondence adopted or authorized by the Board, and to help ensure the Board's directives and resolutions are carried out. In the absence or inability of the Chair to act, the Vice Chair shall act as Chair.
- (b) **Treasurer and Controller.** The Board shall appoint a qualified person to act as the Treasurer and a qualified person to act as the Controller, neither of whom needs to be a Director. If the Board so designates, and in accordance with the provisions of applicable law,

a qualified person may hold both the office of Treasurer and the office of Controller of CC Power. The Treasurer shall be the depository of CC Power to have custody of all the money of CC Power, from whatever source. The Controller shall draw warrants to pay demands against CC Power when the demands have been approved by the Chair or Vice Chair of CC Power. The Treasurer and Controller shall have the other powers, duties and responsibilities of such officers as specified in Section 6505 of the Government Code of the State of California, as amended, except insofar as such powers, duties and responsibilities are assigned to a trustee appointed, as is provided for and authorized in Section 6550 of the Government Code of the State of California, as amended, pursuant to any resolution, indenture or other instrument providing for the issuance of bonds or notes of CC Power pursuant to this Agreement. The Board may require the Treasurer and/or Controller to file with CC Power an official bond in an amount to be fixed by the Board, and if so requested CC Power shall pay the cost of premiums associated with the bond. The Treasurer and Controller shall cause an independent audit to be made by a certified public accountant, or public accountants, in compliance with Section 6505 of the Government Code.

- (c) **Secretary.** The Secretary shall be responsible for keeping the minutes of all meetings of the Board and all other official records of CC Power, and responding to public records requests of the JPA.

**Section 4.07 Management of CC Power.** The Board shall appoint a part-time or full-time General Manager, and may appoint one or more part-time or full-time Assistant General Managers, to serve at the pleasure of the Board. The General Manager shall be responsible for the day-to-day operation and management of CC Power. The General Manager may enter into and execute contracts in accordance with the policies established and direction provided by the Board, and shall file an official bond in the amount determined from time to time by the Board.

**Section 4.08 Other Officers and Employees.** The Board shall have the power to appoint such other officers and staff as it may deem necessary who shall have such powers, duties and responsibilities as are determined by the Board, and to retain independent accountants, legal counsel, engineers and other consultants. The Members may contract with CC Power to provide staff to perform services for CC Power, but such employees shall at all times, and for all purposes including benefits and compensation, remain employees of the Member only.

**Section 4.09 Budget.** The budget shall be approved by the Board. The Board may revise the budget from time-to-time as may be reasonably necessary to address contingencies and expected expenses. All subsequent budgets of CC Power shall be approved by the Board in accordance with rules as may be adopted by the Board from time to time. All expenditures must be made in accordance with the adopted budget.

## **Article V. MEETINGS OF THE BOARD**

**Section 5.01 Regular Meetings.** The Board shall hold at least one regular meeting per year, but the Board may provide for the holding of regular meetings at more frequent intervals. The date, hour and place of each regular meeting shall be fixed by resolution of the Board. Regular meetings may be adjourned to another meeting time.

**Section 5.02 Special Meetings.** Special and emergency meetings of the Board may be called in accordance with the provisions of California Government Code Sections 54956 and 54956.5, as amended.

**Section 5.03 Brown Act Compliance.** All meetings of the Board shall be conducted in accordance with the provisions of the Ralph M. Brown Act (California Government Code Section 54950 et seq.), and as

augmented by rules of the Board not inconsistent therewith. Directors may participate in meetings telephonically or by other electronic means, with full voting rights, only to the extent permitted by law.

**Section 5.04 Minutes.** The Secretary shall cause to be kept minutes of the meetings of the Board, both regular and special, and shall cause a copy of the minutes to be forwarded promptly to each Director.

**Section 5.05 Quorum.** A quorum of the Board shall consist of a majority of the Directors, except that less than a quorum may adjourn from time to time in accordance with law.

**Section 5.06 Voting.** Except to the extent set forth in a Project Agreement or as otherwise specified in this Agreement, each Member shall have one vote, which may be cast on any matter before the Board by each Director or alternate. Except to the extent otherwise specified in this Agreement, or by law, a vote of the majority of the Directors in attendance shall be sufficient to constitute action, provided a quorum is established and maintained.

(a) **Special Voting Requirements as specified in this Agreement:**

- (i) Action of the Board to amend Section 3.03 related to cost allocations shall require the affirmative vote of at least two-thirds (2/3) of the entire Board.
- (ii) Action of the Board on the matters set forth in Section 3.04(c) related to involuntary termination of a Member shall require the affirmative vote of at least two-thirds (2/3) of the entire Board.
- (iii) Action of the Board on the matters set forth in Section 9.01 related to termination of this Agreement shall require the affirmative vote of at least two-thirds (2/3) of the entire Board approved by resolution of each Member's governing body.
- (iv) Action of the Board to amend this Agreement shall be subject to the voting requirements set forth in Section 11.02 below.

## **Article VI. PROJECTS**

**Section 6.01 Projects.** The Board has the power, upon majority vote of the Directors in attendance, provided a quorum is established and maintained, to establish Projects within the purpose and power of CC Power and to adopt guidelines for their implementation.

**Section 6.02 Right to Participate in Projects.** The Board shall provide at least sixty (60) days prior written notice to all Members, unless such notice is otherwise waived, before any Project may be considered for adoption by a vote of the Board. Such notice shall be provided to the Director of each Member. Once a Project is approved by the Board as set forth in Section 6.01 above, all Members shall have the right, but not the obligation, to participate in a pro-rata share in the Project as determined by the Project Agreement. All Members who elect not to participate in the Project have no obligations under the Project.

**Section 6.03 Project Agreement.** All expenses, rights and obligations to any specific Projects will be handled through Project Agreements that will be separate and distinct from this Agreement.

## **Article VII. BONDS AND OTHER INDEBTEDNESS**

CC Power shall also have the power to issue, sell and deliver bonds in accordance with the provisions of the Joint Powers Act for the purpose of acquiring, financing, performing or constructing one or more Projects and to enter into other indebtedness for the purpose of financing one or more studies or Projects and for the purpose of providing temporary financing of costs of development, construction or acquisition of one or more Projects. The terms and conditions of the issuance of any such bonds or indebtedness shall be set forth in such resolution, indenture or other instrument, as required by law and as approved by the Board. Bonds issued under this article and contracts or obligations entered into to carry out the purposes for which bonds are issued, payable in whole or in part from the proceeds of said bonds, shall not constitute a debt, liability or



obligation of any of the Members unless the governing body of the Member by resolution expressly agrees that the Member will be obligated under the bond or other indebtedness or the Member takes on obligations pursuant to a Project Agreement.

## **Article VIII. LIMITATION ON LIABILITY OF MEMBERS**

**Section 8.01** Pursuant to Section 6508.1 of the Government Code of the State of California, no debt, liability or obligation of CC Power shall be a debt, liability or obligation of any Member unless such Member agrees in writing to assume any of the debts, liabilities, or obligations of CC Power pursuant to a Project Agreement. Nothing contained in this Article VIII shall in any way diminish the liability of any Member with respect to any Project Agreement such Member enters into pursuant to this Agreement.

### **Section 8.02 Individual Member Provisions.**

- (a) The City of San José is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies, and, therefore, nothing in the Agreement shall constitute an obligation of future legislative bodies of the City to appropriate funds for purposes of the Agreement. Any obligations under this Agreement and any Project Agreement are special limited obligations of San José Clean Energy payable solely from the Designated Fund (defined as the San Jose Energy Operating Fund established pursuant to City of San Jose Municipal Code, Title 4, Part 63, Section 4.80.4050 *et seq.*) (“Designated Fund”) and shall not be a charge upon the revenues or general fund of the City of San José or upon any non- San José Clean Energy moneys or other property of the Community Energy Department or the City of San José.
- (b) CleanPowerSF’s payment obligations under this Agreement are special limited obligations of CleanPowerSF payable solely from the revenues of CleanPowerSF. CleanPowerSF’s payment obligations under this Agreement are not a charge upon the revenues or general fund of the San Francisco Public Utilities Commission or the City and County of San Francisco or upon any non-CleanPowerSF moneys or other property of the San Francisco Public Utilities Commission or the City and County of San Francisco. CleanPowerSF’s obligations hereunder shall not at any time exceed the amount certified by the San Francisco City Controller for the purpose and period stated in such certification. Except as may be provided by laws governing emergency procedures, officers and employees of CleanPowerSF are not authorized to request, and CleanPowerSF is not required to reimburse CC Power for, commodities or services beyond the agreed upon contract scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of CleanPowerSF are not authorized to offer or promise, nor is CleanPowerSF required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract is certified without certification of the additional amount by the San Francisco City Controller. The San Francisco City Controller is not authorized to make payments on any contract for which funds have not been certified as available in the budget or by supplemental appropriation.

## **Article IX. TERM; TERMINATION; LIQUIDATION; DISTRIBUTION**

**Section 9.01 Term and Termination.** This Agreement shall become effective when at least two Members execute this Agreement. This Agreement shall continue in full force and effect until terminated as provided in this Article; provided however, this Agreement cannot be terminated until such time as all principal of and interest on bonds and other forms of indebtedness issued by CC Power are paid in full. Thereafter, this Agreement may be terminated by a two-thirds (2/3) vote of the entire Board approved by resolution of each Member’s governing body; provided, however, that this Agreement and CC Power shall continue to exist after termination for the purpose of disposing of all claims, distribution of assets and all other functions necessary to conclude the obligations and affairs of CC Power. In no event shall this

Agreement or the powers herein granted to CC Power be terminated until (a) all bonds and other indebtedness of CC Power and the interest thereon shall have been paid or adequate provision for such payment shall have been made in accordance with the instruments governing such bonds and indebtedness and (b) all other obligations and liabilities of CC Power shall have been met or adequately provided for.

**Section 9.02 Liquidation; Distribution.** Upon termination of this Agreement, the Board shall liquidate the business and assets and the property of CC Power as expeditiously as possible, and distribute any net proceeds, after the conclusions of all debts and obligations of CC Power, to any Members in proportion to the contributions made or in such manner as otherwise provided by law. The Board is vested with all powers of CC Power for the purpose of concluding and dissolving the business affairs of CC Power.

## ARTICLE X. ACCOUNTS AND REPORTS

**Section 10.01 Establishment and Administration of Funds.** CC Power is responsible for the strict accountability of all funds and reports of all receipts and disbursements. It will comply with every provision of law relating to the establishment and administration of funds, particularly Section 6505 of the California Government Code. CC Power shall establish and maintain such funds and accounts as may be required by good accounting practice or by any provision of any resolution, indenture or other instrument of CC Power securing its bonds or other indebtedness, except insofar as such powers, duties and responsibilities are assigned to a trustee appointed pursuant to such resolution, indenture or other instrument. The books and records of CC Power shall be open to inspection at all reasonable times to each Member and its representatives.

**Section 10.02 Annual Audits and Audit Reports.** The Treasurer/Controller shall cause an annual independent audit of the accounts and records of CC Power to be made by a certified public accountant or public accountant in accordance with all applicable laws. If permitted by applicable law and authorized by the Board, the audit(s) may be conducted at the longer interval authorized by applicable law. A report of the financial audit will be filed as a public record with each Member. CC Power will pay the cost of the financial audit and charge the cost against the Members in the same manner as other administrative costs.

## ARTICLE XI. GENERAL PROVISIONS

**Section 11.01 Successors and Assigns.** No Member may assign any right or obligation under this Agreement without the consent of all other Members. This section shall not affect, in any respect, any right of assignment under any Project Agreement.

**Section 11.02 Amendments.** Subject to any requirements of law, a two-thirds (2/3) vote of the entire Board will be required to amend Articles II, III, VIII, and IX of this Agreement. Once an amendment of Articles II, III, VIII, or IX is adopted by the Board, the amendment must be approved by two-thirds of the Members pursuant to that Members' applicable approval process. All other provisions of this Agreement may be amended at any time or from time to time by an amendment approved by at least two-thirds (2/3) vote of the entire Board. Written notice shall be provided to all Members of proposed amendments to this Agreement, including the effective date of such amendments, at least 60 days prior to the date upon which the Board votes on such amendments.

**Section 11.03 Indemnification and Insurance.** To the fullest extent permitted by law, CC Power shall defend, indemnify, and hold harmless the Members and each of their respective Directors, alternates, officers, employees and agents from any and all claims losses damages, costs, injuries and liabilities of every kind arising directly or indirectly from the conduct, activities, operations, acts, and omissions of CC Power under this Agreement to the extent not otherwise provided under a Project Agreement. CC Power shall acquire such insurance coverage as the Board deems is necessary and appropriate to protect the interests of CC Power and the Members.

**Section 11.04 Notices.** The Board shall designate its principal office as the location at which it will receive notices, correspondence, and other communications, and shall designate one of its Directors or staff as an officer for the purpose of receiving service on behalf of the Board. Any notice given pursuant to this Agreement shall be in writing and shall be dated and signed by the Member giving such notice. Notice to each Member under this Agreement is sufficient if mailed to the Member and separately to the Member's Director to their respective addresses on file with CC Power.

**Section 11.05 Severability.** Should any portion, term, condition, or provision of this Agreement be determined by a court of competent jurisdiction to be illegal or in conflict with any law of the State of California, or be otherwise rendered unenforceable or ineffectual, the remaining portions, terms, conditions, and provisions shall not be affected thereby.

**Section 11.06 Section Headings.** The section headings herein are for convenience only and are not to be construed as modifying or governing the language in the section to which they refer.

**Section 11.07 Choice of Law.** This Agreement will be governed and construed in accordance with the laws of the State of California.

**Section 11.08 Counterparts.** This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument and as if all Members had signed the same instrument.

**Section 11.09 Dispute Resolution.** The Members shall make reasonable efforts to informally settle all disputes arising out of, or in connection with, this Agreement. Should such informal efforts to settle a dispute fail, the dispute shall be mediated in accordance with policies and procedures established by the Board.

*[Signature Page Follows]*

**IN WITNESS WHEREOF**, each of the Members hereto has caused this Agreement to be executed as an original counterpart by its duly authorized representative on the date indicated below.

(Seal) Date: \_\_\_\_\_  
CCA Name: \_\_\_\_\_  
Attest: Address: \_\_\_\_\_  
\_\_\_\_\_

(Seal) Date: \_\_\_\_\_  
CCA Name: \_\_\_\_\_  
Attest: Address: \_\_\_\_\_  
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Attest: Address: \_\_\_\_\_  
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# Attachment 2

## California Community Power Structure Graphic

